

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

CORY O. JOHNSON v. JACK MORGAN, WARDEN

Appeal from the Circuit Court for Morgan County
No. 9357 E. Eugene Eblen, Judge

No. E2007-02780-CCA-R3-HC - Filed May 12, 2008

The petitioner, Cory O. Johnson, appeals the Morgan County Circuit Court's summary dismissal of his petition for a writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Following our review, we conclude that the state's motion is well-taken, and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Cory O. Johnson, Petros, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon and John H. Bledsoe, Assistant Attorneys General, attorneys for appellee, State of Tennessee.

MEMORANDUM OPINION

The record reflects that on January 9, 2006, the petitioner entered a guilty plea to second degree murder in Shelby County Criminal Court and received a sentence of fifteen years to be served at one hundred percent. As part of the negotiated plea agreement, the sentence for second degree murder was ordered to be served concurrently to a previously imposed sentence arising from an attempted first degree murder jury conviction in Knox County Criminal Court.

On July 20, 2006, the petitioner filed a petition for post-conviction relief attacking the voluntariness of his guilty plea based upon the alleged ineffective assistance of counsel. The trial court denied his petition on May 23, 2007. It appears from the record that the petitioner did not appeal the denial of his post-conviction petition.

On August 30, 2007, the petitioner filed a petition for a writ of habeas corpus alleging that

the judgment of conviction for the second degree murder is void because a concurrent sentence is precluded due to his alleged bond status when both the second degree murder and attempted first degree murder offenses occurred. The state filed a motion to dismiss for failure to state a cognizable claim. After consideration, the habeas corpus court granted the state's motion and summarily dismissed the petition. The petitioner now appeals, and the state has filed a motion asking this court to affirm the judgment of the habeas corpus court pursuant to Rule 20 of the Rules of the Court of Criminal Appeals.

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas corpus relief is limited and available only when it appears on the face of the judgment or the record of proceedings below that a trial court was without jurisdiction to convict the petitioner or that the petitioner's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). To prevail on a petition for a writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. See State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109. We note that the determination of whether to grant habeas corpus relief is a matter of law; therefore, we will review the habeas corpus court's finding de novo without a presumption of correctness. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001).

The state correctly asserts that the dismissal of the petition by the habeas corpus court was proper because the petitioner has failed to state a basis for habeas corpus relief. The petitioner alleges that he was on bond for an aggravated burglary offense when he committed the second degree murder and attempted first degree murder offenses. For this reason, he claims his sentence for second degree murder should have been ordered to be served consecutively to the attempted first degree murder sentence. Rule 32(c)(3)(C) of the Tennessee Rules of Criminal Procedure mandates consecutive sentences when imposing “a sentence for a felony committed while the defendant was released on bail and the defendant is convicted of both offenses.” Contrary to the petitioner's assertion, Rule 32(c)(3)(C) does not mandate that the second degree murder and attempted first degree murder sentences be served consecutively to one another. Instead it would require that the second degree murder sentence be served consecutively to the on-bail offense, i.e. aggravated burglary, assuming the petitioner was convicted of the aggravated burglary. See Hogan v. Mills, 168 S.W.3d 753, 755-56 (Tenn. 2005). We note that the second degree murder judgment is silent as to the aggravated burglary offense. Furthermore, it reflects concurrent service of the second degree murder and attempted first degree murder sentences in accord with both the plea agreement and Rule 32(c)(3). Thus, it does not reflect an illegal sentence upon which habeas corpus relief may be granted.

Additionally, the petitioner alleges that he is entitled to habeas corpus relief because the judgment for second degree murder does not reflect appropriate pretrial jail credits. As to this claim, this court agrees with the state that the petitioner has failed to present any proof that he was entitled

to such credits.

We conclude that the habeas corpus court correctly dismissed the petition. Having discerned no error of law requiring reversal of the judgment of the habeas corpus court, we conclude that the state's motion for an affirmance pursuant to Rule 20 of the Court of Criminal Appeals is granted. For the reasons stated, the judgment of the habeas corpus court is affirmed in accordance with Rule 20 of the Rules of the Court of Criminal Appeals.

D. KELLY THOMAS, JR., JUDGE